LIBRARY
SUPREME COURT, U. S.

No. 233

JUN 13 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

DONALD SIMON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinion below	1
Jurisdiction	2
Questions presented for review	2
Statute and rule involved	3
Statement of the case	4
Reasons for granting the writ	9
Conclusion	14
Petitioner's Appendix	
A—Opinion	App. 1
B—Order Affirming	App. 7
C—Order Denying Petition for Rehearing	App. 8

AUTHORITIES CITED

Cases

Briggs v. United States, 24 F. 2d 961	9, 11
Brown v. United States, 47 F. 2d 681	9, 11
John Bad Elk v. United States, 177 U.S. 529	9, 10, 12
John Brown v. United States, 159 U.S. 100	9, 10
Jones v. United States, 352 U.S. 257	13
United States v. Di Re, 332 U.S. 581	9, 11, 12
United States v. Heliczer, 2 Cir., 373 F. 2d 241	9, 11

In the
Supreme Court of the United States

OCTOBER TERM, 1968

NO.

DONALD SIMON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: *The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States.*

Your Petitioner, Donald Simon, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his judgment of conviction for assault upon federal officers in violation of Title 18, United States Code, Section 111.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this Petition. (App. 2)

JURISDICTION

Judgment of the Court of Appeals was entered on April 15, 1969. (App. 7) A timely Petition for Rehearing was denied on May 14, 1969. (App. 8) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. In a prosecution for assault upon a federal officer, which assault occurred incident to a warrantless arrest, is proof of reasonable cause for the arrest necessary to conviction, or does the mere fact that the officers were attempting to effect an arrest satisfy the provision of the statute that the assault occurred "while such officers were engaged in the performance of their official duties." (Title 18, U.S.C. §111)

2. Has the former right to resist an arrest, where there exists no reasonable cause therefor, been diminished to the extinction of this Court's prior decisions?

3. If reasonable cause is necessary to conviction of an assault upon a federal officer attempting to effect a warrantless arrest, can a complaint filed after the arrest, and no part of the trial record, supply reasonable cause in and of itself, or is the knowledge upon which the officers acted a matter of primary testimonial evidence at trial, subject to cross-examination and impeachment?

STATUTE AND RULE INVOLVED

Title 18, United States Code, Section 111

§ 111. Assaulting, resisting, or impeding certain officers or employees

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

June 25, 1948, c. 645, 62 Stat. 688."

Title 18, United States Code Rule 5(a)

"Rule 5. Proceedings before the Commissioner

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

STATEMENT OF THE CASE

The petitioner was convicted on all counts of a three count indictment returned March 30, 1967, which indictment charged this petitioner did, on March 27, 1967, wilfully and with force, assault, resist, oppose, impede, and interfere with three officers of the Federal Bureau of Narcotics, knowing them to be such officers, and while such officers were engaged in the performance of their official duties, in violation of Title 18, U.S.C., Section 111. (A. 5-6)

The evidence upon which conviction was had, viewed in the light most favorable to the Government, is accurately set forth in the third paragraph of the opinion of the United States Court of Appeals for the Seventh Circuit. (App. 2) However, a fuller exposition of the evidence seems appropriate.

David Haight, a Special Agent of the Bureau of Narcotics, Treasury Department, testified that on March 27, 1967, he received a call from one who identified himself as Davenport of the Madison, Wisconsin Police Department. He testified that the caller, who represented himself as a Lieutenant-Detective related to him, Haight, "certain information about the marijuana activities of a Donald Simon and Jack Friedman. He further stated to me that Friedman was in cooperation with the Madison, Wisconsin Police Department and he named, as one of his sources of supply for marijuana, Donald Simon." (Tr. 20) According to Haight, the person calling himself Detective Davenport mentioned that he had received information from *others* concerning a possible violation of the marijuana laws by the petitioner. (Tr. 26-27) Haight

had not theretofore known any Lieutenant Detective Davenport, and knew only that the call was initiated by one who identified himself as such. Haight had, in fact, never had communications with anyone in the Madison Police Department, (A. 28) nor were the names Friedman or Simon familiar to Haight, and he had never had any dealings with persons who according to the person who identified himself as Davenport gave information to the Wisconsin Police Department. (A. 28)

After the communication from this Lieutenant Detective Davenport, Haight conferred with his immediate superior, Arthur Lewis, and with Assistant United States Attorney Richard Shultz [Northern District of Illinois] and was directed to arrest Simon (A. 27). These conversations may have been by two-way radio. (A. 24)

After these conversations, Haight, together with Narcotics Agents Rendina and Hughes, proceeded to 6016 North St. Louis in Chicago. (A. 24) They had no arrest warrant. (A. 27, 34)

Haight looked through the window of the private residence there and observed the petitioner talking on the telephone in the kitchen at the rear of the house. Then he and Agent Hughes went to the front door while Agent Rendina went around to the rear. (A. 24)

Agent Hughes opened the screen door and rang the front doorbell. When petitioner came to and opened the door, Hughes said "We are Federal Narcotics Agents. Are you Donald Simon?" Defendant answered "Yes." Agent Hughes said "You are under arrest for conspiracy to violate the federal marijuana laws," or violation of the federal marijuana laws. The petitioner said "I am not going anywhere with you." (A. 24, 28, 37) Then he struck Hughes in the mouth. (A. 25)

Then, petitioner fled into the living room knocking furniture about, and Hughes and Haight pursued him and a struggle ensued, and in attempting to handcuff him, struggled falling, all three of them, to the floor. Eventually on the floor the two agents got Simon's hands handcuffed before him, during all of which time petitioner was flailing his arms and kicking. During this time, according to Haight, he and Hughes were kicked numerous times. (A. 25)

After getting petitioner cuffed, Haight went to the back of the house and admitted Rendina. (A. 25)

As Rendina and Haight were entering the living room, Hughes was seating petitioner in a chair. Hughes again said "We are Federal Agents, and we are arresting you for violation of the Federal Marijuana Laws." (A. 25)

While Hughes was standing in front of the chair in which he had seated petitioner, he asked the petitioner if he had any marijuana in the house and the petitioner answered, "No." (A. 31, 40) Then petitioner attempted to get up and, in doing so, kicked out and caught Hughes on the back of his left hand. Rendina grabbed the petitioner from behind with one arm about his waist and one arm and hand about his chin and neck area, and the petitioner bit Rendina's thumb, breaking the skin. (A. 34, 35) The three agents then wrestled him back to the floor, during which Hughes and Haight were kicked. (A. 25-26) The agents then drew a belt through the handcuffs and fastened the belt at Simon's back. They then obtained his coat and left the residence proceeding to the car. Near the car, an incident occurred with the petitioner's father, and Haight, who testified he was holding petitioner from the back in a bear hug, also testified that petitioner came back with his foot and kicked Haight in the right leg between the ankle and knee. (A. 32)

They then took petitioner to Swedish Covenant Hospital where petitioner was checked. The agents then turned him over to the Chicago Police Department for detention until the following day, and the three agents betook themselves to St. Lukes-Presbyterian Hospital for complete check-ups. (A. 32-33) Apparently the sole injury was an abrasion to Hughes' lower lip. (A. 41)

Of this evidence the United States Court of Appeals for the Seventh Circuit said:

> "As an additional ground for sustaining Simon's conviction, the government argues that even if the arrest was unlawful, Simon had no right to resist the arrest as he did. We think this argument has merit, and that the consequences of accepting defendant's argument to the contrary would lead to great mischief with respect to encouraging resistance to, and to endangering, arresting officers. We recognize that law enforcement officers are frequently called on to make arrests without warrants and should not be held, so far as their personal security is concerned, to a nicety of distinctions between probable cause and lack of probable cause in differing situations of warrantless arrests. It is for this reason we believe that the force of *John Bad Elk* has been diminished. See *United States* v. *Heliczer*, 373 F.2d 241, 246 n. 3 (2d Cir. 1967). In the case before us the FBN officers, at the door of Simon's home, identified themselves so that Simon was aware who they were. And the agents did not lose this official capacity, even if the arrest were subsequently adjudged to be unlawful. *Id.* at 245." (Op. 16766, p. 5)

The Post-Arrest Complaint

The information that purportedly went to probable cause in the complaint for arrest was, for the most part, never repeated on the stand and never subjected to cross-ex-

amination, nor was the petitioner ever confronted with it. Haight testified merely as aforesaid, that he received "information about marijuana activities" of a Donald Simon. (A. 27) The matters he set forth in the complaint, which he filed the day following the arrest, were never testified to by him. An effort was made to introduce the complaint through Narcotics Agent Hughes, but admission into evidence was denied, because the Court found that Hughes knew only what Agent Haight had told him. (A. 39-40)

The Court of Appeals for the Seventh Circuit ruled:

> "We agree that the probable cause issue must be determined upon the knowledge possessed by the agents at the time of arrest and not upon evidence developed at the trial, following the pre-trial hearing on the motion to quash." (App. 2)

It then proceeded on the basis of the post-arrest affidavit filed by Haight—which was no part of the evidence on trial—and found it sufficient. (See Paragraphs 5 through 9 of the Opinion of the United States Court of Appeals for the Seventh Circuit. (App. 3-6))

REASONS FOR GRANTING THE WRIT

I This Court should grant Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit because that decision stands for the proposition that the mere fact that the persons assaulted were agents and employees of the Federal Bureau of Narcotics is sufficient to satisfy the statutory requirement that they were "officers . . . engaged in the performance of their official duties." That decision is in conflict with this Court's decisions in *John Brown* v. *United States,* 159 U.S. 100; *John Bad Elk* v. *United States,* 177 U.S. 529; and *United States* v. *Di Re,* 332 U.S. 581. This decision, together with *United States* v. *Heliczer,* 2 Cir., 373 F. 2d 241 is in direct conflict with the Fifth Circuit decision in *Brown* v. *United States,* 47 F. 2d 681 and the Ninth Circuit decision in *Briggs* v. *United States,* 24 F. 2d 961.

II This Court should issue its Writ of Certiorari to the Seventh Circuit to review this decision which, together with the Second Circuit decision in *United States* v. *Heliczer,* 373 F. 2d 241 states blandly, without any apparent authority from this Court, that this Court's rulings relative to a right to resist unlawful arrest established in *Brown* v. *United States,* 159 U.S. 100, *John Bad Elk* v. *United States,* 177 U.S. 529, and *United States* v. *Di Re,* 332 U.S. 581, have been reduced in importance because of growing tendencies in state courts to abrogate that right.

III If reasonable cause for arrest is necessary to conviction of an assault upon a federal officer, then the guarantees of the Sixth Amendment to the right of cross-examination and to confrontation apply as to any other essential

element. This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit because that Court seems confused between the proper evaluation of a complaint for the issuance of a warrant, which is restricted to the four corners of the affidavit upon which it issues, and proof of an essential element, dependent upon evidence developed at trial.

I.

The United States Court of Appeals for the Seventh Circuit has ruled as follows:

> "In the case before us the FBN officers, at the door of Simon's home, identified themselves so that Simon was aware who they were. And the agents did not lose this official capacity, even if the arrest were subsequently adjudged to be unlawful. . . . ." (Op. 16776, page 5.

In other words, the statutory requirement that the officers assaulted be "officers . . . engaged in the performance of official duties" is satisfied by the mere fact that they are employees of the Bureau of Narcotics. That decision directly conflicts with this Court's decision in *John Brown* v. *United States*, 159 U.S. 100. In that case, two deputized peace officers were aware of outstanding warrants against one Kraig. They mistook Brown for Kraig and attempted his arrest and in such attempt were shot and killed by Brown. This Court made it clear that the inquiry appropriate to the consideration of the jury as to the extent of the aggravation was to be measured the same as if they were private citizens, they having no warrant, nor was there any warrant outstanding for Brown. In this Court's decision in *John Bad Elk* v. *United States*, 177 U.S. 529, an attempt was made by policemen to effect

the arrest of John Bad Elk, even though there was no evidence of a complaint having been made before any magistrate or officer charging an offense against him, nor was there any proof that he had been guilty of any criminal offense or that he had violated any rule or regulation of the government, or that any warrant had issued for his arrest. This Court overturned the conviction because the jury was charged that the policemen had the right to use all necessary force to arrest, when in fact, they had no right to arrest.

Strangely, in *United States* v. *DiRe,* 332 U.S. 581, the prosecution not only gave heed to the right to resist an unlawful arrest, but argued that the fact that he did not resist or protest the unlawful arrest was a factor from which probable cause for his arrest could be deduced. In *Briggs* v. *United States,* 24 F. 2d 961, the Ninth Circuit found the prohibitions officers' mere position insufficient to justify the arrest nor to render Briggs liable for resisting the arrest by the agents.

In *Brown* v. *United States,* 47 F. 2d 681, the Fifth Circuit stated the point clearly:

> "The federal offense of resisting an officer in the execution of his duty is not made out if the officer was in fact not executing his duty but committing a trespass of unlawful arrest." (47 F. 2d at 682, concurring opinion).

All of these cases directly conflict with the opinion of the Seventh Circuit quoted above, which makes the fact of federal employment sufficient for conviction under Section 111. *United States* v. *Heliczer,* 2 Cir., 373 F. 2d 241, was critical of restraining official duty "with the boundaries within which an arrest could lawfully be made."

Both this opinion of the United States Court of Appeals for the Seventh Circuit and *Heliczer* directly conflict with this Court's opinions above stated and with the extant opinions, unrepudiated, of the Fifth and Ninth Circuits. Certiorari should be granted on both grounds.

II.

Though clearly recognizing that *John Bad Elk* v. *United States*, 177 U.S. 529, and *United States* v. *DiRe*, 332 U.S. 581 hold there is a right to resist an unlawful arrest, the Second Circuit in *Heliczer* stated:

> "There is growing authority that its [John Bad Elk] vitality is waning." (373 F.2d at 346, fn. 3)

That decision then proceeds to justify the waning of this Court's opinions by reference to state statutes nullifying the teaching of those opinions, and adopts the position that the state courts' persuasions may overrule what this court has stated to be the law. The Court of Appeals for the Seventh Circuit likewise refused to confine federal officers "to a nicety of distinction between probable cause and lack of probable cause in differing situations of warrantless arrests. For this reason we believe that the force of *John Bad Elk* has been diminished." (App. 6)

If the force of those cases has been *diminished* it is for this Court to say so. Further, the citizen who is deemed to know the law should be able to have some reliance on and regard for the law as this Court has stated it, and this Court having stated the law, this petitioner could not have the criminal animus to have breached the law for acting in accordance with what this Court has determined to be the law.

It may be that this Court wishes to change the law, though we hope not. If the fact of officialdom gives an untrammeled right of arrest, without recourse, the police state has begun. We submit that, presuming this petitioner to know the law as set down by this Court, obliterates any felonious intent. We submit that above and beyond felonious intent, the presence on the law books of these decisions (this sought to be reviewed by the Seventh Circuit and *Heliczer*) gives such a range of power to the law enforcing executive as to threaten the security of a free people and leave them abandoned to the whim of the policing power. We consider this latter much more fundamental than the decisions of lower courts that ignore the rulings of this Court, even though ignoring the rulings of this court, in determining unilaterally they are no longer binding, is of great concern.

III.

We believe the above statement adequately sets forth our position that an element necessary to a criminal prosecution must be proved by testimonial evidence in open court, subject to cross examination and right of confrontation. The concept of trial by affidavit has met with a reactionary revulsion even in civil trials. But more important is the fact that the Seventh Circuit has demonstrated confusion in the assessment of what constitutes this essential element with the rules guarding the evaluation of an affidavit supporting the complaint submitted to a magistrate. The Seventh Circuit seems so bound up in the "probable cause" decisions of this Court, starting with the unknown informant in *Jones* [*Jones* v. *United States*, 352 U.S. 257] that it considers those standards applicable to trial guaranteed by the Sixth Amendment. Ap-

parently this Court should dictate in what circumstances it is appropriate to apply the rules of law it sets down. This Court should make clear that trial by affidavit in criminal cases cannot be tolerated.

CONCLUSION

Wherefore, for the above and foregoing reasons, this petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner.

APPENDIX A

No. 16776 SEPTEMBER TERM, 1968 JANUARY SESSION, 1969

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD SIMON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 15, 1969

Before CASTLE, *Chief Judge,* KILEY and SWYGERT, *Circuit Judges.*

KILEY, *Circuit Judge.* Defendant appeals his conviction, by the court without a jury, on three counts of the willful, forceful assault, resistance and interference with narcotics agents in performance of their official duties.[1] We affirm.

Before trial, Simon moved to quash the indictment on the ground, *inter alia,* that his arrest was "illegal, unlawful and unwarranted." The district court decided that the arrest was based on probable cause and that it was therefore unnecessary to decide whether the agents had time to obtain a warrant.

[1] 18 U.S.C. § 111.

The testimony in the light most favorable to the government is: On March 27, 1967, narcotics agents, without a warrant for his arrest, went to Simon's home in Chicago, at night, to arrest him. They observed him through a window, rang the front door bell, and when he came to the door announced to him they were agents. When Simon admitted his identity, the agents told him he was under arrest. He told the agents he was not "going anywhere" with them and struck agent Hughes. The agents followed him into his house and a struggle ensued during which Simon struck and kicked Hughes and agent Haight before they put handcuffs on him. Another struggle followed, with Simon kicking Hughes and Haight and biting agent Rendina. Finally, Simon again kicked an agent before they put him into the agents' car. Agent Haight signed a probable cause arrest complaint the next morning. Rule 5(a), FED. R. CRIM. P. The indictment followed.

The validity of the arrest before us is not determined by Illinois law since 26 U.S.C. § 7607 is determinative. *Cf. United States v. Di Re,* 332 U.S. 581, 589 (1948). The question then is whether Haight's affidavit, basis of the complaint, shows that the agents had reasonable grounds to believe Simon had committed a narcotics law violation, when they made the arrest. We agree that the probable cause issue must be determined upon the knowledge possessed by the agents at the time of arrest and not upon evidence developed at the trial, following the pretrial hearing on the motion to quash. The terms "reasonable grounds" in 26 U.S.C. § 7607, and "probable cause" in the Fourth Amendment, are substantial equivalents. *Elkanich v. United States,* 327 F.2d 417 (9th Cir.), *cert. denied,* 377 U.S. 917 (1964). See also *Wong Sun v. United States,* 371 U.S. 471, 478, n. 6 (1963); *United States v. Walker,* 246 F.2d 519, 526 (7th Cir. 1957).

Agent Haight's affidavit states that in the evening of March 27, 1967, he received a telephone call from Lieutenant Detective Davenport of the Madison, Wisconsin, police department; that Davenport reported, substantially, that he and Detective McFarland had on March 14 seized three pounds of marijuana in the apartment of one Friedman; that Friedman was not arrested and had on March 15, in the presence of his attorney, told the police that Simon had been his source of supply for three years; that on March 21, on information given Detective Kelly by Friedman in the presence of his attorney, Kelly and Friedman picked up a package at the post office addressed to Malcolm Jackson, Friedman's alias, which contained marijuana; that on March 21 Friedman told McFarland the package was sent pursuant to a previous call from Simon in California after Friedman agreed to use the alias and to pay $175.00 for the marijuana; and that on March 27 Friedman told Detective McFarland that Simon had called him from Chicago to check on the arrival of the package and that Simon said he knew something was wrong in Madison and was going to Europe immediately.

Haight's affidavit went on to state that McFarland had given him a description of Simon, his and his father's address and telephone number—all of which had been furnished by Friedman; that Simon was subject of a Madison marijuana investigation in May and July of 1966; that Haight's check of Narcotics Bureau files disclosed Simon's arrest for possession of marijuana in April, 1966; that Haight found Simon's father's name, address and telephone number coincided with the information given by McFarland; and that the person who answered the door at the address, the night of arrest, filled the description Haight had been given and admitted that he was Donald Simon.

We hold that the warrantless arrest was valid because we think the agents could have "reasonably" believed that Simon had committed a narcotics offense and might escape arrest if time was taken to obtain a warrant the next day. The facts and information known to the agents, or learned "from others" before the arrest were "such as to warrant a man of prudence and caution" in believing that Simon had committed the narcotics offense for which he was arrested. *Carroll v. United States*, 267 U.S. 132, 161 (1925). What Lieutenant Detective Davenport knew directly and told Haight was hearsay and what Davenport told Haight Detectives McFarland and Kelly told him was more remote hearsay. But hearsay proximate or remote does not of itself vitiate an arrest with or without a warrant, as long as there is a substantial basis for crediting the hearsay. *Jones v. United States*, 362 U.S. 257, 269 (1960). We think Haight had a substantial basis for believing what Davenport told him, and that Davenport, knowing what he knew directly, had a substantial basis for believing what Detectives Kelly and McFarland told him. See *United States v. McCormick*, 309 F.2d 367, 372 (7th Cir. 1962); *Rogers v. United States*, 267 F.2d 79 (9th Cir. 1959).

We brush aside as frivolous any suggestion that Lieutenant Detective McFarland may not exist as far as Haight knew. What Kelly and McFarland learned from Friedman was from a reliable source. The freedom and cooperation of Friedman, the post office pickup of the marijuana, and the presence of Friedman's lawyer at the various conferences indicate the reliability of the source. This court in sustaining a search warrant noted that in its "functioning" the FBI must reasonably be assured the need of agents in one locality relying upon information given by agents in another. *United States v. Mc-*

Cormick, 309 F.2d 367, 372 (7th Cir, 1962). We see no less a need between state and federal law enforcement officers. This need is evident from the Haight affidavit, namely, a sale agreed to, and confirmed, respectively, in telephone calls from California and Chicago, Illinois, to Madison, Wisconsin, and investigations by Madison police officers with respect to a matter of federal concern. Impediments to cooperative communication and to interdependence between local and federal law enforcement officials should not be encouraged by narrow application of rules of law at the cost of effective lawful cooperation. The confirmation of Simon's address and telephone number, the description, coinciding with Simon's admitted identity at the door, enhanced the reliability of the information given Haight by Davenport and McFarland. The bare affidavit in *Aquilar v. Texas,* 378 U.S. 108 (1964), distinguishes that case from the one before us, and the rule in *Aquilar,* at 114, which Simon relies on, is met here by the circumstances which we think render the hearsay sufficiently reliable. The Commissioner, upon the basis of Haight's affidavit, presumably thought the affidavit sufficient to sustain the arrest, and the district court before trial decided there was probable cause. We think the recent Supreme Court decision in *Spinelli v. United States,* ..... U.S. ..... (Slip Op. No. 8, Jan. 27, 1969), further explicating the standards of *Aquilar,* is distinguishable upon its facts from the case now before us and does not preclude our conclusion that there was probable cause for Simon's arrest.

The case of *John Bad Elk,* 177 U.S. 529 (1900), principally relied on to justify Simon's forceful resistance of the arrest, is inapplicable because of our holding. The same is true of other cases relied on by Simon. Because

the arrest of Simon was lawful, he had no right to resist the arrest with force. *Cf. United States v. Heliczer,* 373 F.2d 241 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967), and authorities cited therein.

As an additional ground for sustaining Simon's conviction, the government argues that even if the arrest was unlawful, Simon had no right to resist the arrest as he did. We think this argument has merit, and that the consequences of accepting defendant's argument to the contrary would lead to great mischief with respect to encouraging resistance to, and to endangering, arresting officers. We recognize that law enforcement officers are frequently called on to make arrests without warrants and should not be held, so far as their personal security is concerned, to a nicety of distinctions between probable cause and lack of probable cause in differing situations of warrantless arrests. It is for this reason we believe that the force of *John Bad Elk* has been diminished. See *United States v. Heliczer,* 373 F.2d 241, 246, n. 3 (2d Cir. 1967). In the case before us the FBI officers, at the door of Simon's home, identified themselves so that Simon was aware who they were. And the agents did not lose this official capacity, even if the arrest were subsequently adjudged to be unlawful. *Id.* at 245.

We conclude that the evidence taken most favorably to the government supports Simon's conviction.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, April 15, 1969

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 16766
CHARLES W. POSEY,
Plaintiff-Appellant,
vs.
CLARK EQUIPMENT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Wednesday, May 14, 1969

Before

Hon. LATHAM CASTLE, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

No. 16776 UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DONALD SIMON, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered that the petition for a rehearing of this cause be, and the same is hereby, Denied.

It Is Further Ordered that the opinion be modified by substituting for the last sentence-paragraph on page 5 of the slip opinion the following sentence:

> The agents testified at the trial that they informed Simon that they were narcotics agents, and we conclude that the evidence taken most favorably for the government supports Simon's conviction.

BRIEF FOR THE UNITED STATES IN OPPOSITION

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 17 1969
JOHN F. DAVIS, CLERK

No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1969

DONALD SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
ELIZABETH MEYER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 233

DONALD SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 409 F. 2d 474.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1969 (Pet. App. B). A timely petition for rehearing was denied on May 14, 1969 (Pet. App. C). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly held that there was probable cause for petitioner's arrest.

2. Whether, in the circumstances of this case, petitioner's convictions under 18 U.S.C. 111 for forcibly resisting arrest and assaulting federal narcotics agents could be sustained in the absence of probable cause for the arrest.

STATEMENT

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of forceable assault, resistance, and interference with narcotics agents engaged in the performance of their official duties, in violation of 18 U.S.C. 111 (Pet. App. A). He was sentenced to five years' probation, the first sixty days of which were to be served in custody (Record on Appeal 47). The court of appeals affirmed (Pet. App. A).

On the evening of March 27, 1967, narcotics agent Haight received a telephone call from Detective Lieutenant Davenport of the Madison, Wisconsin, Police Department, who told him that an informant of that department, Jim Friedman, had given information concerning marijuana transactions with petitioner (Tr. 20).

The Madison police had arrested Friedman in possession of marijuana, and he had named petitioner as his supplier. Several days later Friedman took the Madison police to the Post Office to pick up a package containing marijuana which he said petitioner had sent to him from California in accordance with an agreement between them. On March 27, 1967, Friedman called the Madison police to tell them that peti-

tioner had telephoned him to inquire about the California package and that petitioner had said he knew something was wrong and was about to leave the country. Friedman also gave the Madison police a description of petitioner, his Chicago address, and the name and telephone number of petitioner's father in Chicago.

After receiving this information, agent Haight then checked the Chicago telephone directory, which confirmed some of the information given by Friedman, and he also learned that petitioner had been arrested by the Chicago police for possession of marijuana. He then contacted an Assistant United States Attorney, who agreed that petitioner should be arrested (Tr. 21).

Agent Haight and two other narcotics agents, Rendina and Hughes, went to petitioner's home to arrest him (Tr. 5–6, 19, 66). Through a window, they saw a man who fitted the description given by Friedman and rang the bell (Tr. 6, 86). Petitioner answered the door, and the agents identified themselves as federal narcotic agents (Tr. 6, 87). When petitioner admitted his identity, they told him that he was under arrest for violation of the federal marijuana laws. Petitioner said that he was not "going anywhere" with them and punched agent Hughes. (Tr. 9–13, 87–88.) Petitioner was subdued after a struggle during which he punched and kicked all the agents and bit agent Rendina (Tr. 9–18, 68–70, 88–91). The next day, pursuant to Rule 5(a), F.R. Crim. P., agent Haight filed an arrest affidavit setting forth the grounds for the arrest as de-

scribed above, and the Commissioner issued a complaint (Supplement to Record on Appeal).

Prior to trial petitioner moved to quash the indictment on the ground that there was no probable cause for the arrest. The district court denied the motion, finding that probable cause was shown by the information contained in the affidavit. The court of appeals affirmed the convictions, holding that the arrest was lawful, as based on probable cause, and that petitioner therefore had no right to resist with force. The court of appeals also found "merit" in the government's alternative argument that even if probable cause for the arrest were lacking, petitioner had no right to assault the agents.

ARGUMENT

1. The petition for a writ of certiorari is based primarily on the court of appeals' approval of the government's alternative position that the convictions should be affirmed even in the absence of probable cause for the arrest. That issue is not squarely presented, however, since the court correctly held that the agents did have probable cause to arrest without a warrant. The information known to Agent Haight at the time of the arrest met the standards for probable cause established by this Court in *Spinelli* v. *United States,* 393 U.S. 410. Friedman's information came from his personal dealings and communications with petitioner, and his reliability was shown in his dealings with the Madison police; the trustworthiness of the information also derived some support from the agents' own inquiries. Cf. *Draper* v. *United States,* 358

U.S. 307. In view of the informant's warning that petitioner suspected trouble and said he was going to abscond, the arrest without a warrant was clearly lawful. 26 U.S.C. 7607; *United States* v. *Jamison*, 395 F. 2d 716 (C.A. 2), certiorari denied, June 23, 1969, No. 550 Misc., O.T., 1968.

Petitioner contends that probable cause was not properly established at trial because the detailed information set forth in Haight's post-arrest affidavit was not repeated on the witness stand. It was specifically stated at trial, however, that the affidavit accurately reflected the agents' information at the time of the arrest (Tr. 98–99). And defense counsel objected when the prosecutor attempted to go into the basis for probable cause at trial and when he attempted to introduce the affidavit in evidence (Tr. 20–21, 114). In these circumstances, petitioner is in no position to complain because Haight's testimony at trial was not as detailed as his affidavit. Probable cause is a matter of law to be decided by the court, and where the trial court is also the trier of fact, as in this case, the courts could properly consider information which is on record at prior stages of the proceedings. Cf. *Gatewood* v. *United States*, 209 F. 2d 789 (C.A.D.C.).

2. If it were necessary to reach the question, the government's alternative position approved by the court of appeals is correct. In the circumstances of this case, where the agents fully identified their authority and purpose and proceeded in good faith on information which they believed constituted probable cause to arrest, they were acting "in * * * the

performance" of their duties and were entitled to the personal protection contemplated by the criminal statute, even if a court should later disagree with their judgment as to whether probable cause existed. If petitioner wanted to test the legality of his arrest, he had other, peaceful methods available, short of physical violence. See *United States* v. *Heliczer,* 373 F. 2d 241, 245–246 (C.A. 2), certiorari denied, 388 U.S. 917; *Hodgdon* v. *United States,* 365 F. 2d 679 (C.A. 8), certiorari denied, 385 U.S. 1029; *Amaya* v. *United States,* 247 F. 2d 947, 950–951 (C.A. 9), certiorari denied, 355 U.S. 916; *Palmquist* v. *United States,* 149 F. 2d 352 (C.A. 5), certiorari denied, 326 U.S. 727; *Arwood* v. *United States,* 134 F. 2d 1007, 1010 (C.A. 6), certiorari denied, 319 U.S. 776.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
ELIZABETH MEYER,
Attorneys.

JULY 1969.

No. 233

Office-Supreme Court, U.S.
FILED
AUG 9 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

DONALD SIMON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1968

NO. 233

DONALD SIMON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

The Government's argument starts out with a demonstration of a complete misapprehension of this case.

This is not a case wherein it is being determined whether matters set forth in an affidavit were sufficient for the issuance of a warrant. This case is an appeal from a conviction for the alleged assault upon federal officers. Contrary to the Solicitor General's submission, this issue is squarely before the court as to whether, in the absence of evidence of probable cause for arrest, a conviction for assault under Title 18, Section 111, U.S.C. can be maintained. The question before this court is, whether this

court's many decisions on affidavits for the issuance of warrants may be substituted for an evidentiary showing of probable cause.

It is evident that the court below (Court of Appeals for the Seventh Circuit) did not distinguish the difference between the evaluation of an affidavit for issuance of a warrant, and the Sixth Amendment rights of confrontation, and cross-examination guaranteed to a defendant on trial. This is the main point of this Petition for Certiorari, and it doesn't seem to be comprehended by the United States.

The Solicitor General's final statement (exclusive of alleged authority) is the proposition against which we contend:

> "If petitioner wanted to test legality of his arrest, he had other, peaceful methods available, short of physical violence."

Precisely the point!!! Is he obliged to submit to an illegal arrest, because later at some convenient time, he could demonstrate the arrest to be illegal. The Solicitor General would have this court confuse the cases upon which an affidavit for an arrest warrant was filed and the warrant issued prior to arrest, and then the basis for the issuance found to be insufficient, and a warrantless arrest.

The agents have statutory authority to execute warrants and when he is executing a warrant the authority given an agent of the Bureau of Narcotics to execute arrest warrants is without limitation. (26 U.S.C., Section 7607(1)) But the authority to make arrests without warrant is conditioned upon the arresting officer having "reasonable grounds to believe that the person to be arrested has committed or is committing [a violation relating to narcotic drugs or marijuana]". (26 U.S.C. §7607(2)) Thus the fact of the existence of an arrest warrant would be suf-

ficient evidence on trial to demonstrate the agents were engaged in the performance of their official duties. Equally, evidence must be shown of the "reasonable grounds" when he assumes to exercise his authority to arrest without warrant in order to show that he was in the exercise of his official duties. The difference between a warrantless arrest and the execution of an arrest warrant seems to be lost on the United States.

Not only is that issue squarely before this court, it was put squarely before the court below. This petitioner urged that that court not be confused between the evaluation of a complaint for issuance of a warrant and the Sixth Amendment guarantees to an accused. Since the United States Attorney at the trial level did not understand the difference, since the Seventh Circuit Court of Appeals did not understand the difference, and since the Solicitor General of the United States does not seem to understand the difference, we can only urge this Court to comprehend the distinction in the interest of preserving constitutional guarantees. What the decision of the Court of Appeals does, what the Solicitor General urges, is trial by affidavit, and, on an affidavit that was never introduced into evidence. Trial by affidavit is approved baldfacedly by the Solicitor General and he makes it quite clear that the ex parte affidavit,—not subject to cross-examination, and derogation of the right of confrontation—is necessary to sustain this conviction:

> "Probable cause is a matter of law to be decided by the court, and where the trial court is also the trier of fact, as in this case, the courts could properly constitute information which is on the record at prior stages of the proceedings." (Brief of the United States in Opposition, page 5)

The Court of Appeals for the District of Columbia would be shaken, we submit, if it were advised that its decision in *Gatewood* v. *United States,* 209 F. 2d 789 was being used as condoning this trial by affidavit—an affidavit not in evidence. In *Gatewood*, there was a hearing on a motion to suppress and all three police officers involved in the arrest testified at that preliminary hearing concerning their actions. No police officer, or agent, or anyone was subjected to examination on the motion to quash filed here. See the Court's decision on the motion to quash. Common Law record beginning page 25 through 28. On the trial of the *Gatewood* case one of the officers testified to the circumstances surrounding the illegal arrest and under his testimony the court found the "illegality of the entry was shown even more clearly . . ." Though satisfied that the evidence at the trial established the illegality of the arrest, the Government protested that the question was not properly before the court because the defendant-appellant had not brought up the transcript of the hearing on the pre-trial ruling of a different judge, apparently on the theory that you have to decide which judge's ruling is being appealed from and that one judge cannot be reversed because of an earlier judge's mistake. Though the Court of Appeals held that an erroneous ruling by one judge prior to trial is not binding or final as to a judge later trying the cause, it brought up the record and concluded that both judges were wrong.

Here, the whole of the answer of the United States relies upon an affidavit, no part of the record, not subject to cross-examination, nor confrontation. For instance:

> "In view of the informant's warning that petitioner suspected trouble and said he was going to abscond, the arrest without a warrant was clearly lawful." (P. 5, Brief of the United States in Opposition)

This is found only in the affidavit; no such evidence on trial; the informant was not a witness, necessarily he could not be cross-examined.

And we respectfully submit basically erroneous is the statement later:

> "It was specifically stated at trial, however, that the affidavit accurately reflected the agents' information at the time of the arrest (Tr. 98-99). And defense counsel objected when the prosecutor attempted to go into the basis for probable cause at trial and when he attempted to introduce the affidavit in evidence (Tr. 20-21, 114)." (Page 5, Brief of the United States in Opposition)

The person who testified that the information contained in the affidavit was the basis for the arrest had never received any information from any informant. He never discussed any possible violation of the marijuana laws with any informant. He did not make the affidavit. Thus, when the prosecutor attempted to introduce the affidavit into evidence on the basis of his testimony, it was denied admission obviously. We know no theory on which it could have been introduced during Agent Haight's (the affiant) testimony. We can fathom no basis on which it could have been introduced during the testimony of a fellow agent who knew nothing but what Haight told him.

CONCLUSION

In the light of the true circumstances, the opinion below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

Wherefore, it is respectfully urged that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review this cause.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner